Chicago-Kent Law Review

Volume 51
Issue 2 *Seventh Circuit Review*

Article 19

October 1974

# Securities Exchange Act of 1934 and the Anti-Trust Laws: A Guide for the Practicing Attorney

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# SECURITIES EXCHANGE ACT OF 1934 AND THE ANTI-TRUST LAWS: A GUIDE FOR THE PRACTICING ATTORNEY

Reconciliation of the federal antitrust legislation[1] and the Securities Exchange Act of 1934[2] has posed a difficult problem for the courts. Although the purpose of both statutory schemes—service to the public—is identical, the two are mutually conflicting. The Sherman and Clayton Antitrust Acts attempt to effectively eliminate all unreasonable restraints on competition in order to achieve the most efficient allocation of goods and services at the lowest price; the Securities Exchange Act of 1934 envisions a policy of self-regulation by the registered securities exchanges, the effects of which are often anticompetitive. In fact the New York Stock Exchange's policy of restricting membership and setting minimum commission rates by member brokerage firms are classic examples of "exclusion of competitors" and "horizontal price fixing"[3]—conduct which would constitute per se violations of the antitrust laws absent the sanction of another regulatory statute.[4]

To understand the complexity of the task of reconciliation which confronts the courts it is essential to recall basic principles of antitrust law and the history of the New York Stock Exchange. The Sherman Act originally enacted in 1890 clearly prohibited any combination or conspiracy to restrain trade.[5] Later the Supreme Court, engaging in judicial legislation, interpreted the Sherman Act to prohibit monopolies and trade restraining combinations which were unreasonable under the circumstances.[6] This gloss on the statute which became known as "the rule of reason" was refined and clarified in *United States v. Trenton Potteries*[7] which held that agreements which set prices are unreasonable in themselves without inquiry into whether the prices agreed to are reasonable under the circumstances. And so arose the distinction in antitrust law between conduct which is unreasonable under the circumstances and conduct which is unreasonable per se.

1. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1970). Clayton Act, 15 U.S.C. § 12-21, 22-27 (1970).
2. Securities Exchange Act of 1934, 15 U.S.C. § 77b *et seq.* (1970).
3. Hensley, *Application of Antitrust Law to the Securities Industry*, 10 WM. & MARY L. REV. 136, 140 (1968).
4. Silver v. New York Stock Exchange, 373 U.S. 341, 347 (1963).
5. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1970).
6. The fundamental principal for determining the legality of conduct under the Sherman Act was announced in Standard Oil v. U.S., 221 U.S. 1 (1911), where the court held that section 1 of the Sherman Act reached only undue or unreasonable restraints. Certain arrangements, however, are conclusively presumed to be unreasonable restraints of trade simply by virtue of their obvious and necessary affects on competition. An example of such an arrangement is price-fixing.
7. 273 U.S. 392 (1926).

Various practices of the exchanges which would otherwise be classified as per se violations of the Sherman Act have been part of the organizational structure of the New York Stock Exchange since its formation 1792. The historic Buttonwood Agreement executed by the original broker members of the New York Stock Exchange provided:

> We do . . . hereby solemnly promise . . . that we will not buy or sell . . . for any person . . . any kind of Public Stock at a rate less than one-quarter percent of commission . . . and that we will give a preference to each other in our Negotiations. In Testimony whereof we have set our hands this 17th day of May, at New York, 1792.[8]

From its very beginning the exchange possessed the characteristics of a private cartel: limited and selective membership, fixed minimum commission rates and other practices antithetical to the goals of a competitive economy.[9] After the stock market crash in 1929 abuses existing in the securities industry became patently obvious. Mindful both of the need to protect investors from the unethical practices of bucket shops and boiler shops[10] and also of the important functions the exchanges played in maintaining the liquidity of publicly-held securities and in providing a source of large sums of capital, Congress created the Securities and Exchange Commission in 1934.[11] The relationship between the Commission and the exchanges is a unique one indeed. Rather than imposing specific rules on the exchanges, the Act places an affirmative duty on the exchanges to register with the commission[12] and conditions the registration on an agreement by the exchange "to enforce . . . compliance by its members"[13] with SEC regulations and to file its con-

8. SEC, REPORTS OF SPECIAL STUDY OF SECURITIES MARKET, H.R. DOC. NO. 95, 88th Cong., 1st Sess. 295 (1963).

9. *See generally* Baxter, *NYSE Commission Rates: A Private Cartel Goes Public*, 22 STAN. L. REV. 675, 676 (1970) [hereinafter cited as Baxter].

10. A boiler shop is a small operation which employs high pressure telephone salesmanship to oversell the public. A bucket shop is an office or place (other than a regularly incorporated or licensed exchange) where persons engage in pretend buying and selling of commodities.

11. *See generally* Jennings, *Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROB. 663 (1964).

12. 15 U.S.C. § 78e (1970):

> It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 78f of this title, or (2) is exempt from such registration upon application by the exchange because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the protection of investors to require such registration.

13. 15 U.S.C. § 78f (1970):

> (a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may

stitution and rules with the SEC.[14] The exchange will be registered only if its rules are "just and adequate to insure fair dealing and to protect investors."[15] Thus the statute evidences a policy of allowing exchanges wide latitude in formulating rules regarding their self-regulation, subject however, to SEC surveillance in the interest of market stability. That policy was succinctly described by William O. Douglas, once chairman of the Securities and Exchange Commission:

> [The intention was one of] letting the exchange take the leadership with government playing a residual role. Government would keep the shotgun so to speak, behind the door, loaded, well oiled,

prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:
(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce as far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;
(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;
(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and
(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.
(b) No registration shall be granted or remain in force unless the rules of the exchange include provision of the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.
(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.
(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.
(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.
(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

14. *Id.*
15. *Id.*

> cleaned, ready for use but with the hope it would never have to be used.[16]

Pursuant to its role as watchdog, section 19(b) of the 1934 Act provides that

> The Commission is . . . authorized . . . to alter or supplement the rules of . . . an exchange . . . in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.[17]

Section 19(a) authorizes the SEC to suspend an exchange for a period not exceeding twelve months for violations of any rule or failure to enforce compliance with those rules by a member.[18] The 1934 Act thus establishes a tri-partite relationship between member firms, an exchange and the SEC. Broker-dealers are required to comply with the constitution and rules of the exchange of which they are a member. In turn the exchange is free to establish its own rules and regulations but the 1934 Act requires that all exchanges register with the SEC. The *quid pro quo* of registration is that the exchange's rules be "just and adequate to insure fair dealing in the securities industry."[19] Section 19(b) is of particular importance as it maintains specific areas in which the SEC has authority to order changes in exchange rules subsequent to its registration. The Act does not, however, authorize SEC jurisdiction over particular application of those rules by member exchanges. This "rule" versus "application of the rule" dichotomy has been

16. W. DOUGLAS, DEMOCRACY AND FINANCE 82 (Allen ed. 1940).
17. 15 U.S.C. § 78s(b) (1970).
18. 15 U.S.C. § 78s(a)(1) (1970):
(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—
(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.
19. 15 U.S.C. § 78f(b) (1970).

utilized by the courts in its reconciliation of the Securities Exchange Act of 1934 and the antitrust laws.

The relationship between the two statutes has confronted the appellate courts few times since 1934, and the majority of those cases have been argued in the Seventh Circuit. An analysis of those Seventh Circuit cases beginning with the Supreme Court's only treatment of the issue in *Silver v. New York Stock Exchange*[20] will indicate the course the practicing attorney should adopt in steering his way through the "regulatory Scylla" and the "antitrust Charybdis."

## THE SUPREME COURT'S TREATMENT OF THE ANTITRUST LAWS AND THE SECURITIES EXCHANGE ACT OF 1934

In 1963, the Supreme Court first considered the relationship between these two statutory schemes in *Silver v. New York Stock Exchange.*[21] The plaintiff Harold Silver, was a securities dealer trading in corporate over-the-counter issues, but he was not a member of the New York Stock Exchange. Since instantaneous communication with exchange member firms is of paramount importance for a broker dealing in over-the-counter issues, Silver arranged for private wires to ten exchange member firms. In 1958, pursuant to exchange rules,[22] member firms received temporary approval of the connection between them and Silver's firm. In February 1959, without prior notice to Silver, the exchange's Department of Member Firms sent notice to the member firms involved, instructing them to terminate the wire connections. Silver sought an explanation from the exchange but received none. Alleging that his business decreased substantially because of the firm's inability to obtain quotations quickly and because of the stigma attached to the exchange's disapproval, Silver sued the NYSE for treble damages[23] under the federal antitrust laws charging that the exchange's action amounted to a group boycott.

Writing for the majority Mr. Justice Goldberg put the issue squarely before the court:

> The fundamental issue confronting us is whether the Securities Exchange Act has created a duty of Exchange self-regulation so pervasive as to constitute an implied repealer of the antitrust laws, thereby exempting the Exchange from liability in this and similar cases.[24]

The Court noted, however, that the statutory scheme of the Exchange Act

20. 373 U.S. 341 (1963).
21. *Id.*
22. *Id.* at 344.
23. Silver alleged that the defendant exchange violated sections 1 & 2 of the Sherman Antitrust Act.
24. 373 U.S. at 347.

was not pervasive enough to create the total antitrust immunity which existed in other regulated industries. The very nature of the securities industry is not conducive to the kind of regulation implying exemption.[25] Rather the test to be applied by the courts is: "Repeal of the Federal antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary"[26] Pointing out that the action of the exchange and its members firms in refusing to deal with Silver would have constituted a per se violation of section one of the Sherman Act absent justification derived from the policy of another regulatory scheme,[27] the court noted that article 3, section 6 of the NYSE constitution provides that the exchange "shall have power to approve or disapprove an application for . . . wire connection between any member of the exchange . . . and any non-member firm and may require the discontinuance of any such service."[28] Although the commission can require the exchange to formulate such rules, it does not have jurisdiction to review the particular *application* of those rules in a given instance. Thus in *Silver* the only issue was whether this particular instance of exchange self-regulation was necessary to make the act work:

> [I]t is clear that no justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him . . . No policy reflected in the Securities Exchange Act is served by denial of notice and an opportunity for a hearing.[29]

Since the challenged conduct would be a violation of the Sherman Act unless justified by reference to the self-regulatory goals of the Exchange Act, and since there was no purpose of the Act furthered by anticompetitive collective action taken without according fair procedures, the Securities Exchange Act was not a viable defense to an antitrust claim. The court then pointed out that even though the antitrust laws do not impose a duty of notice, the exchange's conduct exceeded the scope of its authority to engage in self-regulation, and therefore, had not even reached the preliminary justification for what would otherwise be an antitrust violation.[30]

The Court's treatment of *Silver* hints at the dual pronged analysis required in reconciling the two statutes. The initial analysis required is a procedural one. If the conduct allegedly violating federal antitrust law is within the scope of review by the Securities and Exchange Commission, then primary jurisdiction lies in the Commission rather than in the antitrust

25. *See generally* Hale and Hale, *Competition or Control VI: Application of Antitrust laws to Regulated Industries,* 111 U. OF PA. L. REV. 46 (1962); Asch, *Antitrust Laws and Regulated Securities Market,* 11 ANTITRUST BULL. 209 (1967).

26. 373 U.S. at 357.

27. *Id.* at 347.

28. *Id.* at 355 n.11.

29. *Id.* at 361.

30. *Id.* at 365,

court.[31] Although *Silver* does not specifically articulate this approach (since the SEC lacked jurisdiction over the application of a rule to a particular instance) the court implies it:

> Although the Act gives the Securities and Exchange Commission power to request exchanges to make changes in their rules and impliedly therefore to disapprove any rules adopted by an exchange, it does not give the Commission jurisdiction to review a particular instance of enforcement of exchange rules . . . . This aspect of the statute . . . obviates any need to consider whether petitioners were required to resort to the Commission for relief before coming into court . . . . Moreover the Commission's lack of jurisdiction over particular application of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or co-extensiveness of coverage with the agency's regulatory power.[32]

This passage, along with footnote #12 in *Silver*:[33]

> Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange rule . . . a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity . . . .

have been read by defendant exchanges in subsequent cases to imply that if there were SEC jurisdiction to review the challenged rule, then conduct authorized by the rule is immune to antitrust liability. Their syllogistic argument is: *Silver* holds that the antitrust laws are to be regarded as impliedly repealed only if necessary to make the Exchange Act work; the SEC cannot perform its regulatory function unless there is antitrust immunity for conduct subject to Commission review; and therefore, conduct subject to Commission review is *pro tanto* immune from antitrust liability. But this interpretation of these passages in *Silver* is incorrect. Subsequent decisions by the Supreme Court on the relationship between the antitrust laws and the Commodity Exchange Commission supports this assertion.

In *Ricci v. Chicago Mercantile Exchange*[34] plaintiff claimed that his membership on the Chicago Mercantile Exchange was transferred to another without notice or hearing. The difference between this case and *Silver* was that the specific Commodity Exchange Commission rule plaintiff alleged was violated by defendant exchange *was* within the review jurisdiction of the

31. 17 § 201.4 C.F.R. specifies:

> Any person desiring the . . . amendment or repeal of a rule of general application may file a petition therefore with the Secretary of the Commission. Such petition shall include a statement setting forth the text . . . of the rule the repeal of which is desired and stating the nature of his interest and his reason for seeking the . . . repeal of the rule. The Secretary shall acknowledge receipt of the petition and refer it to the Commission for such action as the Commission deems appropriate, and shall notify the petitioner of the action taken by the Commission.

32. 373 U.S. at 357-58.
33. *Id.* at 358.
34. 409 U.S. 289 (1973).

Commodity Exchange Commission.[35] Noting that this was "that different case" referred to in *Silver* the court held that the antitrust action should be stayed pending the administrative agency's review.[36] Thus the "difference" in the cases refers only to the jurisdictional issue and the necessity of deferring to administrative expertise. The quoted passages should not be interpreted to imply that review jurisdiction by the SEC cloaks the challenged conduct in anti-trust immunity. The court in *Ricci* points out that the administrative review is subject, however, to scrutiny by the antitrust court:

> We make no claim that the Commission has authority to decide either the question of immunity . . . or that any rule of the [Commodity] Exchange takes precedence over antitrust policies. Rather we simply recognize that Congress has established a specialized agency that would determine either that a membership rule of the Exchange has been violated or that it has been followed . . . and either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust laws and the regulatory regime. The problem disappears entirely if it is found that there has been a violation of a rule; on the other hand if it is found that the Exchange has merely followed and enforced its own rules, the antitrust court will be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits.[37]

The court in *Silver* and in *Ricci* imply the need for application of the doctrine of primary jurisdiction[38] in this task of reconciliation. Application of the doctrine to the SEC would require the antitrust court to defer action in those specific areas mentioned in section 19(b)[39] of the 1934 Act over which the Commission has power to order changes. Relief would not be limited to an administrative remedy, however. Judicial intervention in the form of subsequent appellate review is available.[40]

Resolution of the jurisdictional issue, however, does not dispose of the second prong of the analysis, the substantive issue of whether or not a particular instance of exchange self-regulation is a defense to an antitrust claim. That the issue was *not* decided in *Silver* is evidenced by the concurring opinion written by Mr. Justice Burger in *Ricci*:

> As I read the Court's opinion, it plainly disclaims any resolution of the issue left open in *Silver*—namely the question of which particular instances of exchange self-regulation occurring within a stat-

35. *Id.* at 299.
36. *Id.* at 302.
37. *Id.* at 307.
38. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 464 (1953).
39. See text of section 19b preceding note 17 *supra*.
40. Petitioner could seek review of the administrative agency's determination under the ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 702 (1970).

> utory scheme providing for self-regulation may be regarded as 'justified in answer to the assertion of an antitrust claim' against the Exchange and its members.[41]

Although *Silver* did not decide which instances of exchange self-regulation were a defense to an antitrust claim, it did enunciate the test for deciding the issue.[42] The meaning of the phrase "necessary to make the act work" is a difficult issue, however. The following summary of Seventh Circuit cases will indicate its adoption of an interpretation synonymous with "necessary to protect the investing public."

## SEVENTH CIRCUIT ANALYSIS

In *Kaplan v. Lehman Brothers*,[43] plaintiff alleged that the practice of exchange member firms fixing minimum commission rates amounted to a per se violation of the antitrust laws. Reading *Silver* to say that action taken by the exchange and its member firms pursuant to its statutory duty of self-regulation is not illegal per se, the court noted that the Commission had implied power under section 19(b)(9)[44] to fix minimum rates and, therefore, according to *Silver* such conduct does not constitute a per se violation of the Sherman act because of the simultaneous applicability of the Exchange Act.[45]

The *Kaplan* decision is a dissatisfying one because of the court's narrow construction of the plaintiff's pleadings.[46] The court did not decide whether or not the minimum commission rate structure is necessary to make the act work as *Silver* requires. Section 19(b)(9) authorizes the fixing of "reasonable rates" and not "minimum rates" of commission, and in the absence of clear congressional sanction of the latter, *Kaplan* should have decided whether or not minimum commission rates which regulate competition between brokers rather than "protect investors" or "insure fair and adequate dealing in securities traded on an exchange" are necessary to make the act work.[47]

41. 409 U.S. at 308.

42. 373 U.S. at 357: "Repeal of the Federal Antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work and even then only to the minimum extent necessary."

43. 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd*, 371 F.2d 409 (7th Cir.), *cert. denied*, 389 U.S. 954 (1967).

44. See text of section 19b preceding note 17 *supra*.

45. 373 U.S. at 347.

46. 250 F. Supp. at 564: "The plaintiffs have cast their lots entirely upon their proposition that the fixing of minimum commission rates through the collective action of the Exchange is illegal *per se* . . . if such action is within the authority conferred upon the Exchange by the Act of 1934, however, the precedent of the Silver decision stands squarely against them."

47. Nerenburg, *Application of the Antitrust Laws to the Securities Field*, 16 CASE W. RES. L. REV. 131, 150-151 (1964).

*Kaplan* provides an instructive lesson for the practicing attorney: pleading a per se violation of the antitrust laws for conduct authorized by section 19(b) assures summary judgment because the per se theory of antitrust liability is tantamount to a complete ouster of the Securities and Exchange Act. The teaching of Silver explicitly repudiates that conclusion and specifies that reconciliation of the two statutes is the touchstone of judicial review.

The second appellate case decided in the Seventh Circuit was *Thill Securities Corporation v. New York Stock Exchange.*[48] Thill was a licensed securities dealer, but was not a member of the NYSE. Plaintiff alleged that adherence to the anti-rebate rule which prohibited a member firm from sharing a commission earned from the purchase or sale of securities with a non-member even though the latter may have furnished the order, was an illegal restraint of trade. The NYSE argued that the exchange enjoyed broad immunity from antitrust liability since the 1934 Act authorized registered exchanges to adopted rules regarding the fixing of reasonable rates of commission subject to review and revision by the SEC. This immunity, it argued, extended beyond the fixing of rates and included rules relating to the sharing of commissions because the prohibition against sharing commissions with non-members is an integral part of fixing reasonable rates.[49] Since the SEC has exclusive jurisdiction over this anti-rebate rule, defendant argued that the conduct was immune. NYSE based its argument on the intimation in *Silver* that "a different case would arise" concerning anti-trust exemption if there were commission jurisdiction. The exchange argued that this was that different case and that the conduct was immune. The majority opinion in *Thill* rejected defendant's interpretation and plainly stated that *Silver* indicates that a reconciliation of the two statutes is not foreclosed simply because of SEC review of exchange self-regulation under section 19(b).[50] Rather the burden is on the exchange to establish that its exemption is necessary to discharge its responsibility which is to "protect investors" and "in-

48. 43 F.2d 264 (7th Cir. 1970).

49. *Id.* at 266.

50. The court's rejection of the defendant's argument that the existence of SEC jurisdiction to review rules authorizing the challenged conduct *ipso facto* established antitrust immunity was based on the Supreme Court's decision in United Staes v. Philadelphia National Bank, 374 U.S. 321 (1963). Under the Bank Merger Act of 1960 the Comptroller of the Currency was required by statute to consider the competitive effects of the proposed merger of the Philadelphia National and Girard Bank. Even though the Comptroller had approved the merger the court sustained the Justice Department's attack of the merger under § 25 of the Clayton Act. Analogizing the SEC's review jurisdiction under § 19b of the Exchange Act to that of the Comptroller's jurisdiction under the Bank Merger Act, 12 U.S.C. § 1818(c)(4), the court in *Thill* held that in the case of the SEC there was even a stronger reason for rejecting the defendant's contention since unlike the Comptroller, the SEC is not required by statute to consider the anticompetitive effects of its determinations. If the SEC does not perform the antitrust function then the court must.

sure fair and adequate dealing in the securities industry."[51] The majority in *Thill* did not divide the issue into its jurisdictional and substantive elements, but Judge Swygert pointed out the necessity to do in his concurring opinion written three years before the Supreme Court indicated in *Ricci* that it was the correct analysis.[52]

It is interesting to note that a second circuit court on facts similar to those in *Thill* accepted the argument advanced by the NYSE in *Thill* that conduct within the purview of section 19(b) is immune to antitrust attack. In *Gordon v. New York Stock Exchange*,[53] plaintiff and the league of independent investors challenged the minimum commission rate rule alleging that the fixed minimum rates were unreasonable under the circumstances[54] and constituted a scheme of price fixing contrary to sections 1 and 2 of the Sherman Act.[55] The court in *Gordon* accepted the argument that had been advanced by the NYSE in *Thill* but did not rest its decision solely on its interpretation of the language in *Silver*;[56] it stressed that the legislative history of the 1934 Act indicated a congressional intent that broad responsibility for self-regulation be vested in the exchanges. The final premise in its argument was that the enactment of the Exchange Act which vested the SEC with power to authorize exchanges "to fix reasonable rates of commission" indicated a congressional recognition of the Commission's competence to serve the antitrust function of preserving competition inasmuch as *United States v. Trenton Potteries*,[57] decided seven years before the enactment of the Exchange Act, held that price-fixing was illegal per se.

This second circuit decision is subject to criticism in terms of the analysis developed by the Seventh Circuit and the Supreme Court. The passage in *Silver* upon which *Gordon* relies deals only with the jurisdictional prong of the issue and was not intended to resolve the substantive issue of antitrust immunity for conduct under section 19(b).[58] The decision in *Ricci* clearly mandates that interpretation of the passage. Furthermore even though the Exchange Act clearly authorizes self-regulation by the exchanges, that policy does not necessarily imply antitrust immunity as *Gordon* holds. The legislative history of the Exchange Act focuses on eliminating the dishonesty, manipulation and insolvency in brokerage houses that had such a disasterous effect on the investing public and on the formation of capital in 1929. Its

51. 433 F.2d at 269.
52. *Id.* at 275.
53. 261 SEC REG. AND L. REP. (July 17, 1974).
54. *Gordon* is analogous to *Kaplan*, although the plaintiff here did not plead a per se violation as in *Kaplan*.
55. Sherman Antitrust Act, 15 U.S.C. § 1 (1970).
56. *Gordon* interprets *Silver* to imply that unless rules subject to SEC jurisdiction under § 19b are not immune to antitrust attack, the Exchange Act cannot work. *Ricci* indicates this is not the correct interpretation of the passage in *Silver*.
57. 273 U.S. 392 (1926).
58. *See* text of section 19b preceding note 17 *supra*.

primary concern was *not* the anticompetitive effects of the securities legislation.[59] Acceptance, therefore, of the *Gordon* premise that conduct subject to SEC review under section 19(b) is immune to antitrust attack because that immunity is necessary to make the act work not only fails to comport with the "close analysis and delicate weighing process mandated by . . . *Silver*"[60] but it also misinterprets the legislative history. Since the late nineteenth century a presumption in favor of competition has pervaded the economic legislation of this nation and that presumption should not be negated without evidence of explicit congressional intent to the contrary.[61]

In the most recent case dealing with these two statutes, *Zuckerman v. Yount*,[62] plaintiff's agent was a broker who sought membership on the Midwest Stock Exchange. His membership was initially denied for reasons which he alleged were part of a conspiracy to restrain trade. The Midwest Exchange was named a defendant for its alleged part in furthering the conspiracy initiated by his competitors. Although the exchange denied plaintiff membership, they did notify him of all information[63] the executive committee had acted upon in its denial of membership. Plaintiff appealed and was subsequently granted membership subject to a probationary period. Finding this unacceptable, he sued the exchange. On a motion for summary judgment defendant argued it had acted pursuant to its statutorily imposed duty of self-regulation, and that *pro tanto* there is an implied waiver of antitrust liability. Alternatively, the exchange argued that even if there were no repeal of the antitrust laws they were not liable since they granted plaintiff procedural due process.[64] Relying on *Silver* the court denied the motion and pointed out that the 1934 Act contained no express exemption from antitrust liability and that repeal was to be regarded as implied only if necessary to make the Securities Exchange Act work. As in *Thill* the exchange had failed to show that the rules allegedly violated by the plaintiff were necessary to the operation of the 1934 Act; the Securities Act was therefore not a defense to the antitrust action.

Impliedly referring to the procedural issue, the court noted that the

59. *See* Baxter, *supra* note 9, at 684-685.

60. *See* Chief Justice Warren's dissent from the Supreme Court's denial of Certiorari in *Kaplan*. "The court below, in a two-page opinion, held that a repeal of the antitrust laws was required to make the Securities Exchange Act work, and that the self-regulatory function of the exchange has been exercised by virtue of § 19b. In my view, this blunderbuss approach falls far short of the close analysis and delicate weighing process mandated by this Court's opinion in *Silver*." 389 U.S. at 957-58.

61. *See* Baxter, *supra* note 9, at 685.

62. 362 F. Supp. 858 (N.D. Ill. 1973).

63. Defendant had charged plaintiff with (1) having made several unnecessary and exaggerated requests to bid up a stock in which he was a co-specialist, in violation of rule 9 of article XXIV of the Midwest Stock Exchange Rules; (2) failing to maintain an orderly market by reason of large spreads between bid and ask quotations; (3) using strong and profane language on the floor of the Exchange.

64. 362 F. Supp. at 860, 861.

SEC lacked review jurisdiction over the *application* of the specific rule allegedly violated and therefore the doctrine of primary jurisdiction did not apply.[65] Furthermore, the court said, the affording of procedural due process did not ipso facto cloak the exchange with immunity. According to *Silver* that is merely a matter of threshold justification and is not dispositive of the issue.[66]

## SUMMARY

These Seventh Circuit cases and the supreme court decisions in *Silver* and *Ricci* point out a method of analysis for the practicing attorney. If the SEC has jurisdiction to review the challenged conduct under section 19(b), his initial remedy must be sought from the Securities Exchange Commission. But SEC jurisdiction is not preclusive jurisdiction—subsequent appellate review by the antitrust court is available. In deferring to the administrative agency the court has the ultimate authority to shape the general outlines of economic policy rather than allowing an agency which is generally sympathetic to the securities industry to do so. In a pluralistic society this is a desirable result since the full panoply of competing economic theories will be considered in a system where the court is subject to public scrutiny.[67]

Once the court takes cognizance of the antitrust claim, defendant has the onerous burden of showing that the challenged conduct is necessary to make the Exchange Act work. Can defendant merely point to SEC power of review over the challenged conduct? Can he argue that if that fact alone does not cloak the conduct in antitrust immunity the Exchange Act will not work? *Silver* answers no, and *Ricci* says that merely solves the jurisdictional issue. It does not solve the substantive issue of what conduct is necessary to make the Act work. The court has not answered this question specifically but its philosophy suggests an answer: the goal of the Securities Exchange Act is protection of the investing public. But how would the court apply this principal? In each case it would be a question of fact. With respect to the issue of minimum commission rates, for example, the court must determine if the investor is protected by a rule which allows marginal brokerage houses to continue in business and also diverts customers to the over-the-counter market, an action which erodes the primary market and impairs the liquidity of publicly-traded securities. On the other hand, the court must consider if the significant attrition of inefficient brokerage firms[68] will not have an unsettling effect on the market and will ultimately involve large economic losses to the investor. There is no easy answer to this issue, but these are the kinds of matters the court would consider. Indeed it is a troublesome problem

65. *Id.* at 862.
66. *Id.* at 863.
67. *See generally* Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207 (1969).
68. *See generally* Godwin, *Antitrust and the Stock Exchange: Minimum Commission or Free Competition*, 18 STAN. L. REV. 213 (1965).

with extensive political overtones. Finally to complete the practitioner's chart, mention must be made of the situation in which the SEC lacks jurisdiction to review application of a specific rule as it did in *Silver* and in *Zuckerman.* In such a case, plaintiff can seek immediate relief in the antitrust court which is bound to apply the test of *Silver*: "The antitrust laws are to be regarded as impliedly repealed only if necessary to make the Securities Act work, and then only to the minimum extent necessary."[69] If the defendant exchange is unable to establish that the challenged conduct is necessary to "protect investors" and "to insure fair dealing in the trading of securities and in the administration of the exchange" he is subject to liability under the antitrust laws.

## PROSPECTUS: SECURITIES ACT AMENDMENT

The practitioner's guide would not be complete without a note regarding pending legislation which if enacted will have a significant impact on the practice of law in this area. The omnibus securities bill[70] will significantly restructure the relationship between the industry and government by expanding the authority of the SEC to pass upon and to order changes in rules of an exchange even after the exchange is registered.[71] This facet of the legislation will, therefore, require an attorney to seek administrative relief before resorting to the antitrust court in more instances than is presently the case.

The most significant part of the legislation, however, is the legislative abrogation of the fixed minimum brokerage rates by May 1, 1975.[72] A recent article[73] in the Wall Street Journal reported that the NYSE refused to comply with the SEC mandate to adopt rules by the end of October, 1974, for implementing the fully negotiated brokerage rates[74] by May 1, 1975. If the SEC forces the NYSE to adopt the rule, the exchange no doubt will institute litigation,[75] the results of which will be a more definitive statement by the Supreme Court on the relationship between the Securities Exchange Act of 1934 and the antitrust laws.

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69. 373 U.S. at 357.
70. *See* Committee Print #1 of H.R. 5050, 265 SEC. REG. AND L. REP. (July 31, 1974).
71. Wall Street Journal, October 11, 1974, at 2, col. 2.
72. Securities Act Release No. 10560 (December 14, 1973).
73. Wall Street Journal, *supra* note 71.
74. Minimum commission rates apply to trades between $2000 and $300,000; trades over these amounts or under $2000 are subject to negotiation.
75. The NYSE and other exchanges have sustained significant losses in the last year. Competitive brokerage rates, it is argued, will increase these losses and ultimately cause the collapse of the securities industry. *See* Securities Act Release No. 10206 (June 6, 1973).